Judges: officials, activists or mediators?

The *interpretive beacons* as a contribution to judicial rationality

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ABSTRACT

In legal systems there are interpretative openings and limits resulting from the bundling of internal factors, related do the judge, and external, related to the environment. The combination of these factors gives rise to a three-judge model: *officials-judges, activists-judges and mediators-judges*. Different methodological proposals seek ways to the correct answer or one capable of restricting *discretion*, with Ronald Dworkin's argument of principle and Castanheira Neves' methodical scheme as affirmative conceptions. With the intention of providing a contribution to the problem of interpretation and its limits, this paper takes the opposite path (negative conception), stipulating assumptions, which if exceeded lead to a legally irrational and, therefore, arbitrary decision. Such presuppositions are the *interpretative beacons* seen under the *objective-temporal* and *subjective-spatial* binomial that can serve as interpretative limit.

KEYWORDS

Theory of Law; Philosophy of Law; Legal Methodology; Legal interpretation; Limits; Hard and easy cases; Rationality.

1. Introduction

The concern with judicial arbitrariness occupies the minds of jurists and literary writers. In "The Process" by Franz Kafka (1982), Josef K. is prosecuted, without being able to defend himself or even being aware of the content of the accusation. The inevitability of arbitrariness torments him as he awaits the outcome, in the expectation of a vain justice. In the end, he is executed. Reality and fiction are confused when rationality moves away from the courts. Various methodologies aim to contain the excessive power, designing models and interpretative limits.

History has shaped *jurisdictio* in different ways[1]. While in primitive societies, the tribal chief combined the functions of legislator, judge, priest and military commander (Afonso 2004, 25), the modern conception of jurisdiction has its roots in the second half of the 17th century, driven by the separation of judicial and administrative functions, abandoning the paradigm of the judge-administrator, from 1790 onwards[2].

In the *common law* system, the magistrate is given the power to create the law, while in the *civil law* there is a clearer division between the judicial and legislative functions, especially from the 17th and 18th centuries. Above the tendency for synchronization between these two systems[3], generalizations in the treatment of the judicial function require contextualization[4]. The expression "judicial power" is rich in meanings, understanding it as the state function exercised by the judge (power) of pacifying conflicts (function), through the interpretation and application of the Law (activity).

Judicial interpretation finds openings and limits. Internal factors such as the magistrate's political, religious, cultural, social and even legal conceptions influence its form and content. External factors also stimulate them, such as current norms, the culture of the court and society. The conjunction of these factors results in three types of judges: *official, activists* or *mediators judges*.

Such conceptions are manifested in different legal systems and in the same court. The citizen is hostage to a *legal lottery*, whose conflict can be decided by any of these judges.

The dimension of judicial discretion will correspond to the sum of internal and external factors. In search of a judicial rationality, methodological currents systematize solutions, with emphasis on Dworkin's (2002, 182) "argument of principles"[5] and Neves's (1982, 200) "methodical scheme". These

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1 For example, in France, the Executive and the Judiciary are linked, with the President of the Republic entrusted with the role of "guaranteeing the independence of the Judiciary" (French Constitution, Article 64).

2 France, Law of 16-24 August 1790, Title III, art. 13: "Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler, de quelque manière que ce soit, les opérations des corps administratifs, ni citer devant eux les administrateurs pour raison de leurs fonctions".

3 Thus, "several recent modifications that seem to be reducing the distance that separates English law and the 'Romano-Germanic family'" (CAENEGEM 2010, 1 – free translation).

4 In the same systemic family, profound differences can be found, such as the limits of the intervention of the Judiciary Power over the other Powers. For example, in civil law systems, Portuguese magistrates do not coerce the public administration in the implementation of public policies, unlike in Brazil.

5 Although Dworkin defends the law as "integrity" and "coherence", the arguments of politicies (public policies) are not to be confused with those of principles (community of principles).

affirmative conceptions define what would be (what is) a rational decision. On the other hand, there are also *negative conceptions* that seek a model of exclusion, defining what would not be (is not) a rational decision.

This paper intends to advance a *negative conception* model by investigating whether the *interpretative beacons* viewed under the binominal *objective-temporal* and *subjective-spatial* can serve as limits for the legal rationality.

The first part will address the issue of "how judges think"[6], focusing on interpretive openings and limits in dealing with hard cases. Reflections will be made on judicial discretion and rationality, confronting the affirmative conceptions of Dworkin (2002) and Neves (1982).

In the second part, the negative proposal of the *interpretative beacons* will be developed, demonstrating the limits outside which there is no rationality in the decision-making activity.

Two pillars are structural to the Rule of Law: a) temporality (manifested by legal certainty, represented by the non-retroactivity of normative commands), and; b) spatiality (inscribed as a protective factor for the individual, in a notion of alterity)[7].

Such legal materials are part of the "rule of law virtues" (predictability, stability, articulation with operators in other branches of the political-legal system, rationalization of discretion) (Linhares 2015, 1781-1783), which stand out in the axiological hierarchy. It will be examined whether both pillars serve as *interpretative beacons*.

The first *interpretative beacon* is *objective-temporal*. It refers to temporality to ensure legal certainty in the application of normative commands (objective), without retroactivity (temporal), regardless of their legislative or judicial origin.

The second is *subjective-spatial*. It is related to otherness, understood as protection of the juridical-civil personality of the citizens (subjective), in which their legal interrelationships (spatial) cannot be burdened discre-

[6] The title is inspired by the book "How Judges Think", in which Richard Posner finds two ways for the judge to resolve disputes: a) the subsumptive method for conventional cases, and; b) broad discretion, including the use of experiences, emotions and beliefs, for non-routine cases (POSNER 2010).

[7] They are common references in different conceptions. Whether due to the need to respect positive law or the transcendental limitations of natural law, legal certainty, predictability, the legal or voluntary creation of obligations are fundamental requirements in individual-State relations (NOVAIS 2018, 22-25).

tionarily in favor of others. Otherwise, the very essence of the democratic contractual-agreement is infringed.

In this work, the research will densify the theme of rationality in judicial decisions, developing the model of *interpretative beacons* (seen under the *objective-temporal* and *subjective-spatial* binomial).

The purpose is to argue that, in hard cases, the rationality of judicial discretion is lost when operating legal materials outside these limits. In the "wrong birth" case, an example of a hard case, the models by Dworkin (2002) and Neves (1982) allow for equally correct solutions to be reached. This work seeks to reduce the plurality of correct answers, defining as irrational (and therefore incorrect) those that violate the guidelines referred to.

2. How do judges think?

Inspired by the book "How Judges Think" by Posner (2010), some reflections emerge on the decision-making process and the judges' models. The intertwining of internal and external factors constitutes the legal system, with its interpretative openings and limits, defining how much discretion the judge has.

In the combination of these factors, three types of judges can be described: *official-judges, activist-judges* and *mediator-judges*. The former corresponds to judges linked to strict legality who seek the *mens legis*, in a reduced interpretative space. *Activist-judges* consider themselves legitimated to defend certain interests or people, resorting to elastic-extensive interpretations, with wide discretion. Finally, the *mediators-judge* exercise the role of mediation between the concrete case and the system[8].

The different ways judges think result in mixed judgments. Without express legislative rules, the interpreter uses existing legal materials to resolve the dispute. The search for legal rationality is the way to restrict interpretative arbitrariness and abuse, followed by Dworkin (2002) and Neves (1982) in their affirmative proposals.

[8] In this work, the notion of mediation as a conflict resolution method will not be developed, due to its conceptual distance from what is discussed here.

This paper presents a description of how judges decide and a prescription of how they should decide hard cases, in order to respect normative limits while ensuring that the decision is not irrational (negative conception).

2.1. Interpretative openings and limits

Deciding is an act of choice. Judicial decisions involve choices about the allegations to be examined, the facts to be considered (and proved) and the normative rule (laws and precedents) applicable.

The decision-making process can be rational or intuitive, prevailing one or the other system, depending on the subject (Bazerman 2014, 15). Objective parameters seek predictability and rationality in legal interpretation. The conciliation of these requirements with the two systems is obtained with the requirement of justification, aiming at a rational decision[9].

Legal interpretation supposes two paths: openness and control.

There are institutionalized interpretive openings (provided for in the legal system itself) and non-institutionalized ones (not provided for therein), giving the interpreter *interpretive windows* into the search for legal and even non-legal materials, such as morality[10], politics and culture. They function as "external interconnections" and "open the cases to *non-legal* arenas, involving the «economic», «political», «ecological», «ethical-religious» and scientific-technological systems»" (Linhares 2015, 1774). Once the *interpretative window* is open, it is necessary to control the interpreter, making him respect interpretative limits.

The *interpretive windows* and boundaries are formed and conditioned by several factors[11], classified as internal and external, and normative and meta-normative.

The internal factors are related to the subject-interpreter, his convictions, constraints, culture and values, from which the conscience about the open-

[9] "It is not intended that the normative legal statement stated, proposed or dictated as a sentence is only rational, but also that in the context of a current legal order it can be rationally grounded" (Alexy 2020, 189-190).

[10] An example is the duty of obedience of minors to their parents "in everything that is not illegal or immoral" (Portuguese CC, art. 128).

[11] Such factors correspond to different plans-perspectives of the problems of the jurisdiction (Neves 1998b, 2-4). Posner synthesizes some factors about judicial behavior: a) personal attitude of the magistrate; b) strategic; c) sociological; d) psychological; e) economical; f) organizational; g) pragmatic; h) phenomenological; i) legalism (Posner 2011, 31).

ings and interpretative limits is established. They manifest themselves in the "very constitutive moments" (Neves 1998b, 4) in the exercise of jurisdiction. Self-restraint is a form of limit (Afonso 2004, 87), even though there is "considerable variety in judges' interpretations of their own responsibilities" (Dworkin 2011, 143).

The judge's personal attitude, values, psychological profile, cognitive biases (Linhares 2015, 1781) and political, religious, and social conceptions influence interpretation. Thus, considering democracy as a relevant value, the interpreter tends to respect some interpretative limits, such as legality, the separation of powers and the search for the popular will.

External factors are legal, institutional and structural. The interweaving of these factors forms the archetype of the established legal system, composed of people, institutions and rules. External factors refer to the legal environment (such as political and interest group pressure), therefore. They can be subclassified into normative and institutional.

By external-normative factors, there are all kinds of normative acts, regardless of the organ of origin (legislative or judiciary[12]) and hierarchy (constitutional or infraconstitutional), including encompassing the rules of self-government and self-restraint of the judiciary (Afonso 2004, 87) ("statutory problem" – Neves 1998b, 3). In some domains, technical and management rules proliferate "to the detriment of classic legal rules and institutions" (Frydman 2018, 17).

External-institutional factors, on the other hand, refer to institutions dealing with aspects of their organization, composition and dynamics of their functioning ("structural problem" – Neves 1998b, 3).

The intertwining of all these factors builds legal systems, with all their vicissitudes, nuances and peculiarities[13]. Systems more akin to jusnaturalism allow decisions with more discretion, while positivists interpret the law more narrowly (Roosevelt 1999).

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[12] The openings are in the general rules existing in the legislation and in the precedents (Linhares 2016, 239).

[13] Despite the diversity of legal systems, it is possible to compare them, considering variables such as protection of human rights, interference in economic freedom and effectiveness of jurisdictional provision, such the The World Bank ranking (https://portugues.doingbusiness.org/pt/rankings – free translation).

In the common law, the judge can exercise more discretion (Linhares 2015)[14], since the indeterminacy of the legal material is wider[15]. Its interpretative possibilities are "pragmatically more extensive" (Linhares 2015, 1770), behaving as "pragmatic-political" (Linhares 2015, 1771).

In continental Europe, a model is adopted that inhibits:

> the judge from going beyond the defining limits of his functions, that is, that does not allow him to go beyond his duty to apply the law without the use of excessive creativity, safeguarding himself, from this form, the coherence between the jurisdictional functions and the Jacobin conceptions of democracy (Afonso 2004, 74-75).

In the relations between the powers, the legislature establishes political commitments and the judiciary exercises a counterweight, guaranteeing "respect for the fundamental values of the legal order and the law" (Linhares 2010, 474). The new judicial protagonism is characterized by the "confrontation with the political class and with other organs of sovereign power" (Santos, Marques, Pedroso 1995, 3).

The granting of decisional legitimacy does not necessarily confer political legitimacy[16], which derives from the democratic election, in rejection of aristocratic systems (Afonso 2004, 50). Consequently, in legal systems where judges are elected (and subject to impeachment based on the clause "during good behavior" – Afonso 2004, 141), more discretion is recognized in relation to judges on the European continent, in which their selection is made by public tender (Afonso 2004, 144). Even within the same system there are differences, as between English *judges* and *magistrates*.

There is a movement of approximation of both systems[17]. For example, the American Judge becomes "more vulnerable to formalism than a certain

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[14] Linhares 2015, 1769. Referring to American law, Dworkin highlights the importance of defining the extent to which "unelected judges should assume an authority to decide for themselves which of the semantically available interpretations of a controversial statute would produce the best law" (Dworkin 2011, 133).

[15] In common law systems, there is a certain normality with the exercise of political discretion in the "twilight zones", which is somewhat disturbing for judges on the European continent. (Kennedy 1997, 179).

[16] From the perspective of conventionalism: "judges must respect the legal conventions in force in their community, except in rare circumstances" (Dworkin 2007, 144-145).

[17] Neves 1982, 207. An interesting example is the adoption of American accounting standards by European companies, allowing them to be listed on the New York Stock Exchange. It is a trend of "global

pragmatic predestination would have us suppose" (Linhares, 2015, 1776). In any of these systems, the interpreter relies on hypothetical legal materials in search of binding legislative or jurisprudential criteria[18].

Differences between common law and civil law define interpretive openings and limits. The "binomial easy cases / hard cases"[19] allows for a systematization of the subject, giving rise to "two other binomials — *legal treatment / non-legal treatment, application of the «law» / discretionary creation*" (Linhares 2015, 1765). For Atienza, a hard case is one in which: a) there is no consensus in the legal community on how to resolve it; b) it is not routine, nor is it a mechanical application of the law; c) it is not subject to decision weighing conflicting legal provisions, by means of deductive arguments; d) requires principled reasoning; e) necessarily involves moral judgments (Atienza 1997, 10).

The Neves jurisprudentialism repels this binomial. His methodical scheme does not allow for a Cartesian system of realization of the Law applicable indistinctly to any legal case. There are no abstract and previously adequate answers for the case, giving rise to the interpretive activity of the magistrate ("constitutively judicial mediation" – Neves 1982, 227-228), based on practical-axiological rationality ("intersubjective dialectic"). The available legal materials are used (norms, precedents, jurisdictional pre-judgments and dogmatic models), in order to limit the *voluntas* by the concrete decision-making judgment.

This jurisdictional law results from a "mix of legal law and judicial law" discussing "its normative limits" (Neves 1982, 229). The methodical scheme is based on the relationship between the case (problem) and the system, regardless of the complexity of the cause, paying attention to what is new. He understands that, in easy cases, the mechanical decision would not be the best methodology, as circumstances may require different treatment, and should experiment with the system. What may be suitable for one case may not be so for another.

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standard due to the primacy of the United States in the finance sector as in the related activity of analysis and financial evaluation" (Frydman, 2018, 66 – free translation).

[18] This is Posner's lesson mentioned in Linhares 2015, 1770.

[19] Several authors accept the binomial easy/hard cases, although using different terminology, as mentioned in Linhares 2010, 462 and 472). On the other hand, the relativity of this definition is not unknown, in which an easy case can be considered hard (or vice versa), depending on the "ideological strategist" operating in the case (Kennedy 1997, 166).

Dworkin (2002) also rejects such a binomial. He argues: a) the difficulty in knowing whether the case is hard or easy; b) application the Hercules method to both cases, with the evidence of the answers to the questions asked in the easy cases. Even in an easy case, such as respecting the speed limit on a highway, Dworkin (1999, 424) claims that:

> a person whose convictions about justice and equity were very different from ours might not find this question so easy; even if he ended up agreeing with our answer, he would insist that we were wrong for being so trusting. This explains why questions considered easy during a certain period become hard before becoming easy again - with the opposite answers.

However, in easy cases, discussions about justice and equity remain outside the legal debate of the concrete case, except in exceptional situations. Usually, the driver is fined for exceeding the limit, even if he disagrees, considers it unfair or not equitable. Only in specific (non-ordinary) situations can the exceptionality be invoked, such as proving that he was taking an injured person to the hospital. Judicial interpretation does not open the debate on the justice or morality of the easy question, already embodied in the legal norm, with no creative margin for the judge.

Two difficulties to the application of the logical-deductive method are listed. The first is the historical-cultural nature of Law, making entirely logical or rational explanations impossible (Cordeiro 1999, XVIII-XX). And the second is its limitation in the face of concrete cases, preventing the use of the subsumptive method in the following situations: vague and indeterminate norms; incompleteness of the system with *intra* and *extra-systematic* gaps; contradictions of principles, and finally; the existence of unfair or inconvenient solutions (Cordeiro 1999, CIII).

However, such difficulties do not permeate all cases. There are simple and routine cases that can be solved through mere objective parameters[20], including the use of artificial intelligence for decision automation[21]. Its inter-

[20] These are cases in which there are no legal phenomena that justify overcoming legalism, as recognized by Castanheira Neves: "Not that legalism is completely abandoned and does not remain a common reference and a mode of legality that is still concurrent or alternative, as we will see , but there are also many legal phenomena that need to be overcome, with direct repercussions on the tasks of the jurisdictional function" (Neves 1998b, 4 – free translation).

[21] This possibility is provided for in the European Charter of Ethics on the Use of Artificial Intelligence in

pretative limits are foreseen in the applied law itself. The norm is sufficient to find a solution for the easy and commonplace case[22]. Possible "under" and "over inclusive" situations of the standard (Schauer 1991, 30-34) would be exceptions.

In easy cases, the subsumptive method (deductive-formalist) can be applied, dispensing with interpretative density, with only one correct answer. They involve objective parameters, without (or with a reduced degree of) indetermination. Some examples: a) the deadline for offering the contestation; b) traffic fines for exceeding the speed limit; c) compensation for moral damages for flight delays[23]. In this and other common situations, once the factual framework has been established, the law must be applied, otherwise the interpretation will be *contra legem*. So it will be a arbitrary interpretation[24].

In increasingly common situations, the legislator creates *windows* for the interpreter to use secondary sources of law[25]. Legal law gives way to the nebulous area of political-law or even *emotion-law*. The law does not fit perfectly with the factual hypothesis. The major premise (normative prediction) does not meet the minor premise (the facts). The indeterminacy of general rules (Linhares 2016, 239) or incompleteness of the normative command[26]

Judicial Systems and their environment adopted by CEPEJ at its 31st plenary meeting.

[22] According to Hart, there will be "simple cases that are always occurring in similar contexts, to which the general expressions are clearly applicable" (HART 2007, 139).

[23] The question-and-answer method is sufficient to obtain the necessary information to judge these common cases. For example, ask: 1 – did the passenger have a ticket for the referred flight? 2 – the flight delay occurred for a justified reason (one can list the justified and unjustified reasons, outside of which the case may become hard); 3 – Was the delay longer than three hours? 4 – Did the airline provide any type of compensation? From the responses, it can be understood whether or not compensation is due and its quantum (European Union, EC Regulation 261/2004). This method is not useful when it involves subjectively verifiable issues, such as, for example, the constraints suffered by the flight delay, such as when the passenger was unable to attend his daughter's wedding. This would not be a common case.

[24] Portuguese legislation provides that the law is the immediate source of law (Portuguese CC, art. 1.º, 2). And it prohibits the trial by equity, except in exceptional situations authorized by law or by the agreement of the parties (Portuguese CC, article 4.º).

[25] Neves 1982, 212. Castanheira Neves mentions the extensive (gaps and openings) and intensive (normative indetermination, linguistic vagueness, etc) insufficiency of the systems, demanding "broad constitutive autonomy of problematic-decision mediation both in terms of invoked criteria and judicial possibilities" (Neves 1993, 71). Easy cases do not suffer from this inadequacy, and you are asked to disagree with the master on this point.

[26] The themes of gaps and legislative indetermination are different. There are criticisms of the use of the expression "gaps", as it is based on the assumption that there is a closed and sufficient system (proposed by the formalist methodology). Indeterminations, on the other hand, require the mediation of law with the determination of legal norms. A third theme is missing cases (for Karl Larenz this is not an interpretive problem). In the methodical scheme, the "centrality of analogy" in the judicial-decision making of law is highlighted (Bronze 2002, 304).

(legal or jurisprudential) or the complexity of the case demands an intense interpretive exercise, authorizing some discretion[27]. These are the hard cases.

In these cases, there is no way to know *a priori* which of the possible interpretations should prevail (Dworkin 1999, 306), justifying the interest in methodologies that, based on the use of elements of the legal system itself, lead the "decision-voluntary to a rationally determined judgment-judgment" (Linhares 2010, 472). Concerned with openings and interpretative limits, different proposals define parameters of rationality ("rationalizing criteria").

Admitting the plurality and equivalence of correct decisions does not mean that any decision is correct. There are decisions that will be incorrect, due to their unlawfulness, when extrapolating the interpretative limits.

Although the juridicist discourse is accepted as a decision-making method, the classification of the cases in easy or hard is the premise adopted. Depending on the complexity of the case, the decision-making method will be different (Linhares 2016, 242; Linhares 2017, 157), with a focus on the problem of resolving hard cases, based on Neves (1982)' methodical jurisprudentialist scheme and the search for *interpretative beacons* outside of which interpretation will be understood as non-rational[28].

In hard cases, pondering principles, some judges imprint their personal, moral and religious convictions in disregard of the legal system (Waldron 2018; Quirk 1995; Hirschl 2011, 121-137), guided by voluntarism (White 1985, 67). This distances them from self-subsistent rational criteria (Linhares 2012, 405). Rationality is the guarantee that prevents the use of principles as rhetorical artifacts to disguise and legitimize subjective and emotional arbitrariness[29].

According to the criterion adopted, there are different conceptions of judges[30], like those of Kennedy (1997), Dworkin (2002), Ost (1983) and Fuller (2002).

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[27] Hart 2013, 658. The performer "dives into an «open area» or an «empty slate» of discretionary possibilities" (Linhares 2010, 463).

[28] Such a task is inspired by the formulation of theories of justice from the perspective of deconstruction, as done in "The Philosophy of the Limit" by Drucilla Cornell. Based on the established theoretical framework, this work seeks a complementary path to the affirmative proposals of Dworkin and Castanheira Neves, investigating what is not (rational) instead of examining what is.

[29] Also recognizing the need for institutional remedies against subjectivism, Hart adds: "It is therefore understood that if what officials are to do is not rigidly determined by specific rules but a choice is left to them, they will choose responsibly having regard to their office and not indulge fancy or mere whim, though it may of course be that the system fails to provide a remedy if they do indulge their whim" (Hart 2013, 657).

[30] For other models, Orlando Afonso presents one, according to the intensity of independence and juris-

Kennedy (1997, 180-186) presents three kinds of judges: a) restricted activist (seeks the correct legal solution, based on an interpretative strategy); b) divider of differences (more passive than the previous one, controlled by ideology), and; c) bipolar (combines traits of the previous ones, acting liberal or conservative, depending on the case).

Dworkin (2002) portrays a model judge-philosopher who formulates theories about legislative intent and legal principles, endowed with qualities such as:

> superhuman ability, wisdom, patience and sagacity, whom I will call Hercules. I assume Hercules is a judge in some representative US jurisdiction. I consider that he accepts the main non-controversial rules that constitute and govern the law in his jurisdiction. In other words, he accepts that laws have the general power to create and extinguish legal rights, and that judges have a general duty to follow the previous decisions of their court or of superior courts whose rational foundation (rationale), as the jurists, applies to the case in court (Dworkin 2002, 165).

Ost (1983, 1-70) refers to three kinds of judges, inspired by the world of games and sports: a) Judge Jupiter (legalistic character and literal interpretation, in respect to the kelsenian positivist pyramid, coinciding the Law with the law); b) Judge Hercules (creator of the law, transforming generality and legal abstraction into concrete law, with social concern); c) Judge Hermes (makes use of hermeneutics, combining norms and values).

Fuller (2002) conceives five types of judges, according to their conduct: a) respect for the law, even if it is unjust, in the expectation of better solutions from the executive power (clemency to the accused); b) ampliative interpretation of the legal text, relativizing its rigor; c) considers emotional and rational factors inseparable, respecting the law and refusing to participate in unfair judgment; d) application of the law in its own terms, abstracting its personal conceptions; e) is based on common sense and the search for justice in the concrete case.

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prudential creativity: a) executing judge; b) delegated judge; c) guardian judge; d) political judge (Afonso 2004, 82).

In relation to interpretative openings and limits, resulting from the bundle of internal and external factors, a model can be designed with three kinds of judges: a) *officials-judges*; b) *activists-judges*, and; c) *mediators-judge*.

Officials-judges stick to the text of the law[31] or of the precedent, respecting it, in (re)strict formalist-interpretative activity, avoiding printing meta-legal conceptions in the jurisdictional decision. It is conceived as the "mouth of rational universality", (embodied in the law) (Linhares 2010), applying the subsumptive method, without exercising "ethical responsibility for community projection" (Neves 1998b, 43). The State must provide services to citizens, the reason for its existence being (Afonso 2004, 46). Replaces the notion of power with that of service (Duguit 1921). Their personal conceptions do not prevail over external factors, embodied in the legal environment, given by the institutions and rules in force.

Activists-judges assume the mission of fulfilling a political-economic-social agenda in the postmodern world. They free themselves from bureaucratic-administrative subordination, attributing a "political meaning" to their function (Afonso 2004, 46). Law assumes a pragmatic-functional dimension (Neves 1982, 249), reducing it to an instrument to pursue certain ends (material-functionalism). Discretion is admitted to a greater extent, relativizing the limits between law and politics, between judging and legislating (Linhares 2015, 1786) and between legal reasoning and common sense. The current rule is submitted to the magistrate's scrutiny, considering the law as a mere starting point[32]. *Activist-judges* can be classified as *activists-parents* or *activists-legislator*.

The *activists-parents judges* fulfill the function of protecting the party or certain right (*judge as politician*), incumbent on them to elastically interpret the text of the legal norm, to achieve their activism, getting involved in social causes, such as the protection of workers, minorities, animals, gender issues, relegating to the background the normative set, whose validity is conditioned to tutelary teleology. The *paternalistic judge* feels responsible for society,

[31] As imposed on Italian judges by the Constitution of the Italian Republic, art. 101: "La giustizia è amministrata in nome del popolo. I giudici sono soggetti loosening alla legge".

[32] Such a kind of judge is restricted in Portuguese law. Pragmatic-functional judgments about the inconvenience or injustice of the law do not authorize waiving its application (CC Português, art. 6º). There is an explicit obligation to judge and the duty of obedience to the law (idem, article 8), prohibiting the use of personal conceptions, but respecting the mens legislatoris (idem, article 9).

assuming the role of protecting those who, in his opinion, need a different treatment, as proclaimed by *Critical Legal Scholars*[33].

Judges-activists-legislators, on the other hand, see themselves as holders of political power, legitimated to co-create the legal system (*judge as legislator*). As political agents, they make decisions on behalf of the society they claim to represent, even when not directly chosen by it, acting as *oracles of justice*.

Finally, the *mediators-judges*[34] perform the normative-constitutive mediation between the legal system and the concrete case (Neves 1982, 200), in "judicative ponderation" (Neves 1982, 202). They start from the "concrete legal problem" (Neves 1982, 198), making use of the jurisprudentialist methodological scheme operated in normative dialectics by the "practical-prudential judgment" (Neves 1982, 200. 261). It seeks to reconcile internal and external factors, with the judge acting to enforce the law, without submitting to political influences, but with autonomy to resolve the specific case.

Mediators-judges distance themselves from *activists-judges*, because in "jurisdictional decision, a normative validity is always presupposed and intentionally invoked, which is not intended to be altered or replaced by another that is programmatically instituted, since the aim is only to affirm it, through a constitutive-concretizing determination, in the cases of its problematic realization" (Neves 1982, 202). Under the juridicist view, its interpretation finds limits in the legal system itself.

Depending on the type of judge (official, activist or mediator) there is a different relationship between internal and external factors, resulting in greater or lesser interpretative amplitude. The search for rationality permeates the three models, emerging affirmative conceptions (in search of the correct answer) and negative conceptions (demonstrating the incorrect answer).

2.2. The "justice" in the dock and the *interpretative guidelines*

This topic analyzes the solution of hard cases, confronting the methodological proposals of Dworkin (2002) and Neves (1982). In this sense, "justice" is put in the dock, subjected to an "inquisition" to be investigated

[33] For its supporters, the judicial decision "is not determined by previously established legal norms, but by social, political and ideological factors" (Lamego 2018, 177 – free translation).

[34] The expression does not refer to the notion of conflict mediation, as an alternative instrument to jurisdiction, in search of consensual, non-impositional solutions, in consideration of the culture of pacification and the function of public power itself to mediate the different interests of society.

when the openings and interpretative limits are rationally performed. Or, on the contrary, in what situations will it be legally irrational, introducing the argument of *interpretive boundaries*.

In ancient Roman law, the college of pontiffs held a monopoly on the *interpretatio iuris*, which consisted of knowledge of customary private law, *legis actiones* formulas and *actus legitimi*. They applied to the concrete case the "just" law that no one else had knowledge of. The Law of the XII Tables dismantles this monopoly, and private law becomes *ius scriptum*, with no more secrets about its content (Afonso 2004, 163-164). In the Middle Ages, law was based on the "will of God", interpreted by men.

With the French Revolution the creed of faith was replaced by creed in the law, losing "its divine origin to become a product of reason" (Afonso 2004, 166). The judicial function presupposes making several choices, in fact and in law, such as: a) which rule is applicable among those equally capable of regulating the case; b) what is its meaning; c) how to resolve a case without a directly applicable rule (Carnelutti 2000, 162).

For hard cases, an *interpretative window* opens, conferring the judge numerous possibilities that vary according to the model of judge. The exercise of discretion makes it possible to apply the interpreter's individual conceptions, based on "assumedly *non-legal*" intentions and references (Linhares 2010, 463). In the universe of interpretive practices, limits must be defined, otherwise broad judicial discretion is allowed, transforming it into a dictator-judge, absolute lord or monopolizing "oracle of justice".

Alexy's (2020) theory of principles opened *interpretive windows* to subjectivism, although his intention was precisely the opposite. His arguments against the indeterminacy of the law also apply to the precedent. A clash of principles can mean a clash of values (Linhares 2017, 93), allowing the interpreter to enter the "twilight zone" (Linhares 2016, 241) in which the relativization of values[35] finds no obstacle, in the postmodernist world[36].

There is a difference between rationality and legal rationality. Even if a judgment based on personal or political criteria is understood to be rational,

[35] Relativization occurs with the interpreter's values overcoming institutional values (Schauer 2009, 4).

[36] The growing multiplicity of understandings results from the relativist, denialist, irrational, liquid and empty postmodern world. The relativization of values and concepts further expands interpretive freedom, frustrating the expectation of predictability of the jurisdiction. Where would be the dividing line between interpreting and creating, if you can talk about it? Adapting Feyerabend, there is an interpretative MMA (Feyerabend 1977, 34 and 335).

even using legal materials, as is the case with the functionalist discourse, legal rationality presupposes judgment based on legal criteria and based on legal materials.

Rationality is the instrument of control of discretion[37]. The judge is a human being, endowed with will, priorities and thoughts. His judgment cannot be based simply on a political-ethical-ideological will. Individual voluntarism cannot serve as a source of law. Power is based on rational criteria (Weber 2011, 311)[38].

The *interpretative windows* correspond to limits, based on a rationality defined by abstract criteria (such as the proceduralist theory of Luhmann – Luhmann 1980), concrete (legitimation through results, such as the wealth maximization criterion), or even combining them.

Interpretive freedom is limited by the legal system itself, with the respect of legality, repelling "trans-legal standards" (diverging, on this point, from Dworkin), at least for systems based on civil law, in which the magistrate has no legislating power.

There is no guarantee of correctness or certainty in the interpretation based on moral criteria (Dworkin 2011, 125). Alludes to comparisons with interpretations of poems, films or songs (Dworkin 2011, 151-152). These are works of art, with purposes absolutely different from a legal norm, in which the interpreter is encouraged to seek a meaning of "second intentions". A work of art keeps secrets, unlike the legislator who seeks to be as clear as possible and the interpreter must be faithful to it. On the other hand, in clear legislative provisions, easily subsumed to easy cases, without moral incursions, the reason and certainty is the mere application of law.

In hard cases, interpretation involves subjectivity and uncertainty. For example, the one who commits an illicit act and causes damage responds civilly. What would an illicit act be? What is damage? In the specific case, was there any damage? These are questions of law and fact that require dialectics.

To admit discretion is to fall into the quick sands of the "Tyranny of values" (Schmitt 2010). This is because value conflicts are resolved with the imposition of a supposedly superior value on other supposedly inferior ones, based on a sentimental appropriation of the values of those who intend to

[37] The vocation of the judicium is to exorcise arbitrary force by appealing to reason (Neves 1998b, 1).

[38] The weakening of institutions corresponds to the strengthening of charismatic authorities, with public authority being recognized, as noted by Castanheira Neves (Neves 1982, 182).

impose justice (Schmitt 2010, 49). In this scenario, the "correctness" of the interpretation is a variable judgment according to the mental state of the people (Dworkin 2011, 129).

The level of discretion differs according to legal methodology. Formalist-legalist orientations treat the judicial function as declaratory of law (Chiovenda 1998, 8)[39], while those of a materialist-functionalist character hold the view that the magistrate is a co-creator of the Law. There are methodological proposals that recognize the role of discretion and those that, without prejudice to emphasizing the constitutive role of jurisdiction, assume a juridicist perspective (Dworkin 2002 and Neves 1982), rejecting it[40].

Contextualizing Dworkin's conception, three situations are envisaged: a) absence of discretion, as in the rule that establishes that the deadline for contestation is 30 days (CPC PT, art. 569.º); b) weak discretion, in which the interpreter starts from the legal text without going beyond it, such as identifying what would be an "illicit offense" or "threat of offense"[41]; c) strong discretion, in the hypothesis of a legislative gap and absence of similar cases[42].

The theory of principles causes indeterminacy and instability (Linhares 2012, 397), but gains juridicity when "they manifest themselves in bindingly institutionalized positive criteria" (Linhares 2012, 407; Linhares 2017, 159), without decisionism or voluntarism. With this, the interpretation is not totally open, being inserted in a historical-sociocultural context.

In jurisprudentialism, interpretation has an application function, being "always «a connection of *lex scripta* and *ius non scriptum*, by which only the true positive norm is constituted» (Esser), and the entire realization of law is a constitutive-integrating nomodynamic that cannot do without translegal and transpositive normative elements" (Neves 1982, 261).

Considering the risk of moving from an "*ateleological formalism* to a *teleologism of pure ends*", the juridicist proposal aims to overcome "the postulate of the self-subsistent determinability of materials (and, *a fortiori,* the logical-deductive intelligibility of the judgment)" (Linhares 2017, 156).

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[39] In a similar sense, Carnelutti: "The judge is *vox legis*, while *ius dicit* for the singular case, *declaring what the Law wants* (objective) *with respect to him*" (Carnelutti, 2000, 224 – free translation).

[40] For Aroso Linhares, the *discretion* is rejected when its use means a free choice of criteria without a legally effective binding (Linhares 2017, 159).

[41] Portuguese CC, art. 70.º, 1. The law protects individuals against any unlawful offense or threat of offense to their physical or moral personality.

[42] Portuguese CC, art. 10.º, 3. 3. In the absence of a similar case, the situation is resolved according to the norm that the interpreter himself would create, if he had to legislate within the spirit of the system.

Both Neves (1982) and Dworkin (2002) reject models built *a priori* for the subsumption or application of concepts in the complex reality of the cases, moving away from the positivist premise of fullness of the legal system. And, by rejecting functionalism and pragmatism, they agree with the autonomy of law in relation to social facts, which should be concretely realized according to its own principles and values.

They also have similar methods, divided into three phases: a) choice of the norm in the methodical scheme and the Dworkian pre-interpretation; b) the definition of the hypothetical normativity of legal criteria and Dworkin's interpretative moment, and; c) satisfaction of the demands of the concrete case (judicial decision) and Dworkin's post-interpretive moment. And they ensure legal rationality, legitimizing creative interpretation in situations of interpretive openings.

Your conceptions also differ, due to substantial differences. The methodical scheme consists in the realization of the law, through the dialectic realization of the system in the concrete case. It seeks to "provide a normative-legally 'just' solution (with practical-normative correctness) to the concrete case through a judgment that adequately mobilizes, or according to the requirements of that fairness, the legal normativity with its specific criterion" (Neves 2003, 443). It is not a question of a general model, with reference to other cases, but rather the adequacy of meaning to the specific case, in a form of practical adjustment *in concrete*.

In contrast, the Dworkian concept of law as integrity rejects the use of different criteria for similar cases, that is, it denies casuistry. It has a normative-hermeneutic bias, in search of the best theory between pragmatics and conventionalists. For Dworkin (2002), in the face of a new case, one should consider the socio-cultural practice as adequate criteria for the decision, like a "chain novel". He defends a decision-making model for all cases, as is clear in the following excerpt:

> The reader will now understand why I called our judge Hercules. It must construct a scheme of abstract and concrete principles which provides a coherent justification for all customary law precedents and, insofar as these are to be justified by principles, also a scheme which justifies constitutional and legislative provisions.[43]

[43] DWORKIN, 2002, p. 182.

For Neves (1982 and 1993) the conclusion will be rational[44] when it refers "to certain presuppositions, without abstracting the 'decisive mediator' (Neves 1982, 201-202), through a structured measurement of thought – when in this way it manifests its «reason for being». Therefore, we have the antithesis of «reason» in «intuition» and «emotion», as experiential attitudes without measurement by thought and its discourse and, therefore, also without foundation and justification assumptions – that is to say, without transsubjective or objective validity (or claim to validity)" (1993, 34-35 – free translation).

The discretion exercised with legal materials is legitimized in the canons of the Rule of Law[45] (juridicist proposal). Judicial interpretation is constrained by institutional and normative limits, even when it occurs without the mediation of legal norms. Therefore, the conception of discretion based on internal factors is rejected, which would be arbitrary and authoritarian, given the difficulties of its limitation[46], however much one seeks to frame the decision in a sphere of rationality[47].

From the standpoint of judging hard cases, the *official-judge* model starts from a mistaken premise: the completeness and unity of the system (Linhares 2010, 462). The normativist structure loses its imperativeness in the face of the indetermination of the norm in relation to the case, making the pure and simple subsumption, this one restricted to easy cases, unfeasible. Therefore, for hard cases, he will exercise his discretion, operating the legal materials and observing rationalizing criteria, being able to arrive at more than one correct answer.

The *activist judge* violates the duty of impartiality – the first attribute of the just judge (Afonso 2004, 65-66). With respect to opinions to the contrary (Taruffo 2006, 237), a judgment based on political criteria cannot even be considered legally rational, consisting of veritable anti-democratic discretion by the interpreter. In post-modern times, the path of institutional-legislative

[44] It presents a form of problematic-dialectical and argumentative practical rationality, based on the decision-making judgment of an axiological nature (Neves 1982, 250).

[45] Also in the autopoietic sense of the legal system, Drucilla: "The legal system, in other words, grounds of validity of its own propositions by turning back on itself" (Cornell 1992, 121).

[46] The impossibility of setting such limits is evidenced by the relativity of their definition (MacIntyre 1988, 393).

[47] It would be the situation of a magistrate condemning the defendant for not having sympathized with him, seeking a posteriori factual and legal grounds to justify his arbitrariness.

change is hampered by the empowerment of the *judge-activist*, strengthened with greater interpretative freedom. Similarly, Dworkin:

> As a conception of law, pragmatism does not stipulate which of these various notions of a good community are well-founded or attractive. It encourages judges to decide and act from their own point of view. It assumes that this practice will better serve the community – bringing it closer to what an impartial, just and happy society really is – than any other alternative program that requires consistency with decisions already made by other judges or the legislature (Dworkin 2007, 186)

In this "crisis of the judge", the "sense of regulatory references" is losing (Neves 1998b, 2). The *judge-activist* is trusted to be a bulwark on behalf of society, forgetting that he, too, can be captured by instrumental logic, like the legislator. The requirements of neutrality and impartiality serve to avoid their personal interest.

Justice is respect for the limits of the legal system (Cornell 1992, 143). Even if he disagrees with it, the magistrate must use the sources of law coming from the legal normative system, therefore. In this sense, Neves:

> It is not legal to call sources of law (certainly in the proper sense) any and all normative criteria mobilized in the concrete realization of the law, many of which come from other normative systems (thus, ethical, ethical-social, political-social criteria, etc.) and that, despite this mobilization, they cannot consider informing the content of the current law (Neves, 1982, 230 – free translation).

Judicial discretion is restricted by some rationalizing criteria, such as: a) the limits of the law itself (Neves, 1982, 269), to confer and delimit the legal openness, with vague expressions; b) the analogical judgments; c) the teleology of the rule; d) the arguments from principles; e) use of legal materials (*Critical Legal Scholars*).

Such criteria are not only a normative problem, but also relate to the model of judge. Does not guarantee a single correct answer[48], assuming

[48] Depending on the interpretive method, the results may be different, which is also possible even using the same methods (Dworkin 2011, 149).

this is possible[49]. This is troublesome to the party on a demand, submitted to a Kafkanian process, whose condemnation is in its mishap regardless of what is done.

The imprecision of interpretive limits can leave the law to the discretion of interpreters, reducing it to a word game, piling up principles and arguments while disguising emotions and arbitrary feelings. Limits are essential for the stability of the legal system, without which the Rule of Law itself is in jeopardy.

It is possible to determine the law and its materials through a "frame" or "border" (Linhares 2010, 460), despite the difficulty in establishing an objective-rational criterion for legal rationality, in view of the fallibility of the formalist-positivist conception and in view of the broad subjectivity of the functional-materialist methodology.

The affirmative conceptions aim to build methods that manage to restrict the magistrate's interpretative margin, preserving rationality (correct answer[50]). Neves mentions objective normative limits ("legally posited law always falls short of the historically and socially problematic domain") and intentional ("the realization of the law assumed a normatively material sense" – Neves 1998b, 8), guaranteed by the argumentation and justification (Neves 1993, 32-33).

In the "wrong birth" case (detailed in the next topic), an example of a hard case. The models by Dworkin and Neves lead to equally correct solutions. This work inverts the meaning, seeks to reduce the plurality of correct answers, defining as irrational (and therefore incorrect) those that violate the *interpretative beacons*.

The easy case is the one that has only one correct answer; but if there are alternatives, the case is hard. In fact, the rationality can be present in more than one correct answer, although some of them are better than others (Atienza 1997, 25-26). Therefore, for hard cases, there are correct and incorrect alternatives, the latter of which must be rejected. If it is hard to define which

[49] The correct answer is the one that gives greater value to historical, social and cultural practice, among the countless possible meanings, in the wake of the "chain novel thesis", sought by those who participate in the legal debate (Dworkin 2002, 444). Nevertheless, Dworkin recognizes the difficulty in claiming the truth in controversial cases (Dworkin 2011, 144-145).

[50] "If we cannot demand that government come up with the right answers about the rights of its citizens, we can at least require it to try. We can demand that you take rights seriously, that you follow a coherent theory about the nature of those rights, and that you act in accordance with your own convictions" (Dworkin 2002, 286).

of the correct ones should prevail, the incorrect one can be discarded from the plan, reducing uncertainty for the court.

Even "between" or "beyond" the easy and hard cases, such as Atienza's "tragic cases" (Atienza 1997, 13, 25-26), the model of interpretative benchmarks developed here presents a hypothesis to allow the identification of(s) incorrect(s) answer(s). It aims to guarantee the jurisdictional limits whose violation makes the decision irrational and, therefore, invalid as the solution of the case.

For Kant (undated), knowledge depends on some *a priori* conditions that are found in the subject to allow experience. Sensitivity connects objects to the subject. Sensations form the content of knowable experience. Before mental representation, the object is found in pure forms of intuition, consisting of two assumptions: time and space[51].

Considering time and space as conditions is a way of structuring thought that is equally valid for defining interpretive limits, albeit with some adjustments. We are not using such categories in the Kantian way[52], linked to a subject, but in order to be inspired by this way of thinking, in which time and space are unavoidable presuppositions.

The act of judging involves a double dimension: knowledge (matter of fact and law[53]) and legal (jurisdictional) experience – in which the law is constituted and manifests itself while it is realized (Neves 1982, 1982, 181 and 198).

The Rule of Law presupposes predictability, security and rationality for its citizens (*rule of law virtues*). Legal-democratic institutional normality requires rationality in public choices, eliminating "all arbitrariness in the activity of decision-makers" (Bronze 2012, 15). Disrupture of this order characterizes a regime of exception, without the possibility of *accountability*, in which the Powers become masters of themselves.

Irrational decisions dethrone core values of the Rule of Law, turning fundamental rights and guarantees into mere empty declarations. And the

[51] KANT undated, 43.

[52] For Kant, space would be a condition of possibility for external phenomena. Both consist of pure *a priori* intuition, not a concept (Kant undated, 45-46; 51).

[53] The question of fact involves determining the legal relevance of the concrete situation and proving the elements and effects of this relevance. The question of law, on the other hand, is distinguished in terms of abstract and concrete law (Neves 1993, 165).

citizen reduces the condition of slave of another's will, in flagrante *capitis diminutio*.

In the application of interpretive openings and limits, among the countless possible alternatives, one of them cannot be admitted: the one that does not fulfill the assumptions of time and space. The decision will be legally irrational when it retroacts to create obligations for people outside the legal (jurisprudential) or contractually defined hypotheses.

3. In search of a judicial rationality: *interpretative beacons* – a contribution

There is a plurality of rationality discourses. There is rationalization by outcome or political ideology; intersubjective rationality (practice–subject–subject); deconstructive rationality (Critical Legal Scholars); practical communitarian rationality (MacIntyre 1988); procedural rationality (Luhmann 1980); among others.

Some conceptions recognize intuition and its strength over logical reasoning, such as the Critical Legal Scholars that permit the open area judgment. Kennedy refers to the magistrate system, in which the solution is first defined and then elements to support it are sought in the system ("how I want to come out" - HIWTCO) (Linhares 2017, 39). The legal system is manipulated to fit the intuitive solution already found, attributing to the principles an ontological sense and validity of the legal system, although there is no explicit defense of the superimposition of intuition over the rationality.

Therefore, the question arises about how to guarantee the rationality of judicial decisions. Two conceptions present themselves. Those of a positive character, highlighting the models of Dworkin and Neves, finding legal rationality in the rigorous use of legal materials. And those of a negative character, object of this work.

Assuming the coexistence of rationally justifiable and, therefore, correct solutions, this paper intends to develop a proposal to exclude the incorrect answer, characterized as such when the *interpretative beacons* are exceeded.

The *interpretive beacons* are based on principles that can be compared to the light of a lighthouse: although it cannot be determined exactly what to follow, it serves to indicate when we are in the wrong direction. This is Cornell's position:

> A principle as I use it here is not a rule, at least not as a force that literally pulls us down the tracks and fully determines the act of interpretation. A principle is instead only a guiding light. It involves the appeal to and enrichment of the 'universal' within a particular nomos. We can think of a principle as the light that comes from the lighthouse, a light that guides us and prevents us from going in the wrong direction. A principle, however, cannot determine the exact route we must take in any particular case; it does not pretend that there is only one right answer. It can, however, serve to guide us, by indicating when we are going in the wrong direction. If a principle cannot give us one right answer, it can help us define what answers are wrong in the sense of being incompatible with its realization (Cornell 1992, 106).

The *interpretive beacons* work like this: they do not guarantee the correct answer, but they allow us to perceive when we are far from it.

As limits to interpretation, some principles overlap in the legal system, denoting a certain hierarchy. They are normative values and principles that serve as foundations-criteria for the realization of the law (Neves 1998, 155). The legal system is composed of strata, the first being formed by positive, transpositive and suprapositive principles.

The transpositive principles are associated with each specific dogmatic branch of law, such as criminal legality; private autonomy, and *res iudicata*. They include general clauses. They are part of the history of each branch of these rights and their suppression would undermine the Law itself. The suprapositive principles, on the other hand, are transversal to the entire domain of Law, being common to the domain of legality, ultimate principles associated with a constitutive dialectic of the person (Neves 1993, 71).

Two suprapositive principles stand out. One is predictability, embodied in legal certainty and non-retroactivity, related to time. And the other is alterity, denoting the right/obligation relationship of third parties, related to space. Both have the same axiological scaling as any other. They are fundamental pillars for the very existence of the Rule of Law, validating it.

The *interpretive guidelines* complement the interpretive control system. When respected, conclusions are rationally justifiable. Going beyond them, we have a legally irrational judgment that overflows the borders of the acceptable minimum.

For hard cases, abstract models – even if rational and logical – are unfeasible, as they do not cover the complexity of the case and completeness of the elements to be considered. However, such models are valid to exclude legally irrational conclusions, whose manipulation of legal materials proves to be arbitrary.

The *guidelines* are normative factors, found in the hierarchy of the system itself, which is sought to be argued in this work. They are not absolute and may yield to the defense of the Rule of Law itself. They become flexible in situations where their application puts the Rule of Law in jeopardy. It is a contradiction: the Rule of Law is relativized in order to preserve it. It would be self-defense. A part is sacrificed to preserve the whole.

Two *interpretative beacons* establish interpretative limits outside of which there is no legal rationality, but within which it is possible. They are time and space.

Take the case of "wrongful birth"[54]. This is a hard case, without express legal discipline, in which antagonistic decisions can be considered correct. Judging the claim valid or unfounded may be rationally justifiable, no matter how strange it may seem to the jurisdictional, whose legal uncertainty forms the scenario of an authentic Kafkanian process.

The Portuguese Supreme Court of Justice has judged the issue on three occasions. The first in 2001 (unanimous result)[55], decided that non-existence of the right to non-life. The second in 2013 (by majority)[56], in which Judge Pires de Rosa gave a dissenting opinion, supporting the right to non-existence. And in 2015[57], there was overruling, understanding that there is a "parents" ability to terminate the pregnancy and prevent its birth.

[54] It is one of the types of wrongful actions, alongside wrongful conception and wrongul life, in which the right to "non-existence" is discussed.

[55] Supreme Court of Justice, Process 01A1008, 1st Section, Rapporteur Pinto Monteiro, unanimous, decision of 19/06/2001.

[56] Supreme Court of Justice, Review Appeal No. 9434/06.6TBMTS.P1.S1, Rapporteur Ana Paula Boularot, 7th Section, judgment of 01/17/2013, by majority. Source: http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/e657efc25ebbdf3b80257af7003ca979?OpenDocument&Highlight=0.9434, accessed on 04/19/2021.

[57] Supreme Court of Justice (Portugal), Process: 1212/08.4TBBCL.G2.S1, Rapporteur Heldes Roque, 1st. Section, unanimous judgment on 03/12/2015 (revised).

The following legal materials used in the judgments were: a) constitutional principles[58]; b) infraconstitutional legislation[59]; c) morality[60]; d) analogical judgments, referring to euthanasia and suicide[61]; e) "legislative vacuum", exercising the faculty of deciding as if it were a legislator (judge as a legislator) (Portuguese CC, art. 10.º, 3).

From the analysis of internal factors (the judge's attitude) and external factors (legal and institutional provisions and the Portuguese legal environment), it can be seen that no political agenda was sought. The interpreter used elements of the normative system itself. The diversity of understanding is possible, given the indetermination, which does not mean that there is *a priori* irrationality. Therefore, the *mediator-judge* model prevailed.

In the three situations in which the issue was judged, it can be said that there was rationality, from the perspective of jurisprudentialism. Thus, there were three correct answers for the same case, although different from each other.

In particular, in the last judgment (2015) it appears that there was a change in case law to recognize the obligation to compensate the person causing the damage (doctor/laboratory), undermining the legal categories based on space and time, associated with the *rule of law virtues* (predictability and stability).

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[58] In the case of 2015, it was reasoned: "In this case, it is important to know whether the granting of compensation in these specific circumstances, the disabled birth of the minor perpetrator, constitutes legally reparable damage in view of our legal system, thus reaching the conclusion that after all, there may be a "right to non-life", which would jeopardize constitutional principles cf. art. 1, 24 and 25 of the CRP regarding the protection of the dignity, inviolability and integrity of human life, whether in terms of «being» or «non-being»" (Lisbon Court of Appeal, Process: 2101-11.0TVLSB .L1-8, Rapporteur Catarina Arêlo Manso, unanimous decision on 04/30/2015 (Appeal partially upheld).

[59] Portuguese Penal Code, art. 142, 1, "c": "1- It is not punishable to terminate a pregnancy carried out by a doctor, or under his direction, in an official or officially recognized health establishment and with the consent of the pregnant woman, when: (...)

[c)] There are solid reasons to foresee that the unborn child will suffer, in an incurable way, from a serious illness or congenital malformation, and it is carried out in the first 24 weeks of pregnancy, with the exception of situations of non-viable fetuses, in which case the interruption may be practiced at all times;".

[60] In the case of Becker v. Schwartz, the New York Court of Appeals ruled that resolving the issue is a mystery best left to philosophers and theologians (Janowski 1988, 47). In Portugal, in the case of 2015, it was decided that: "In the theory of the "wrongful birth action", a "wrongful life action" is accumulated, this one is rejected *in limine* because it is considered inadmissible the compensation for the personal damage of having been born (...)".

[61] "(...) and would lead us to question other parallel situations such as euthanasia and suicide, which would have different readings, thus reaching the conclusion that after all there may be a "right to non-life" ", which would call into question the structural constitutional principles enshrined in articles 1, 24 and 25 of the CRPortuguese, with regard to the protection of the dignity, inviolability and integrity of human life, whether in terms of "being", or in terms of «not being»" (excerpt from the vote given in the case of 2013).

This is because the decision creates a retroactive obligation (to compensate) (since at the time of the facts, case law understood the absence of the right to non-existence and, consequently, the obligation to compensate).

These two legal values validate the legal order (Neves 1982, 247), intrinsically linked to the rule of law virtues. They are constitutive principles of the Rule of Law, appearing as elements of its conception and operation, and of existence requirements, without which arbitration progresses.

Space and time constitute a priori categories of the legal system. All internal relationships and interrelationships with other systems develop in a spatial environment, occupying fractions of time. The attributes of predictability and legal security allied with respect for otherness legitimize rational-legal power from a Weberian perspective. They are also the origin of several other principles, such as legality, impersonality, the prohibition of a judge or an exception court, among others.

The discretion that rejects such attributes touches the constitutive core of the Rule of Law, threatening its rational-legal foundation, by admitting *ad hoc* and *ad hominen* decisions. These are decisions that go back to a consolidated past, making the present insecure and the future unpredictable, by creating obligations for subjects without express legal provision.

The judge does not have a map to know if the path is correct. But it is possible to know when you are on the wrong path. The reference point where the dividing line between correct and incorrect interpretations is defined is a very complex issue, whose solution is beyond the scope of this work.

For the time being, a contribution is sought in the sense that, among other incorrect answers, one of the criteria for defining them is the model of interpretive beacons. A retroactive interpretation that establishes obligations or removes rights, as indicated in the 2015 precedent, will be considered incorrect.

Thus, the *rule of law virtues* materialize with respect to the two *interpretative beacons*: objective-temporal (irretroactivity) and subjective-spatial (alterity), explored below.

3.1. Objective-temporal *beacon*

The first *interpretative beacon* is time. The relationship between time and law is too complex.

Legal situations are consolidated in the past, protected against normative innovations, whether legal or jurisprudential. There are normative limits

that are related to the temporal dynamics (Neves 1998b), such as the obsolescence of laws that arise in full and later lose their validity. These limits are assimilated by the criteria and foundations of the system, being linked to principles and subject to weighting.

In another sense, time also correlates with legal certainty, predictability, stability, business prosperity, family, social, business and administrative organization. Citizens cannot be surprised by a new regulation without having the opportunity to adapt to its command. For the same reason, a new interpretation or a new precedent must submit to the same principle. It is a basic element of the social contract.

The principle of legal certainty has three dimensions: stability of legal relations, predictability of state action and risk reduction (Canotilho, Mendes, Sarlet, Streck 2013, 231). It consists of the foundation of the power of rulers to found and create the law (Miranda 2005, 137).

If rules are created to govern past situations, there is no social peace or common good. The breakdown of this element undermines the very confidence of the State. The non-retroactive application of rules (normative, jurisdictional and administrative), is an objective requirement for validating the Rule of Law, related to the temporal aspect (Portuguese Civil Code, article 12). According to Canotilho (2003, 257):

> Man needs security to conduct, plan and shape his life autonomously and responsibly. For this reason, the principles of legal certainty and the protection of trust were considered from an early age as constitutive elements of the rule of law.
> (…)
> The **general principle of legal certainty** in a broad sense (covering, therefore, the idea of protection of trust) can be formulated as follows: the individual has the right to be able to trust that his acts or public decisions affect his rights, positions or legal relationships based on legal norms in force and valid by these legal acts left by the authorities based on these norms are linked to the legal effects specified and prescribed in the legal system.

Legal interpretation is limited by legal certainty. This is an *objective-temporal interpretive beacon*. As a supra-positive principle, it applies to criminal, tax and civil law, prohibiting, respectively, criminal classification, the

imposition of taxes and the creation of obligations based on past facts. The legally provided exceptions benefit the party, never hurting it.

The effects of the past cannot simply be erased or disregarded by a court decision. Judgment can apply to past facts, reaching its effects. But it cannot innovate, establishing that the party should have acted in a certain way, without normative clarity. The requirement of predictability requires that the rules in force at the time of the facts be applied. Irretroactivity consists of a timeless and universal principle[62].

This *ex-post-facto* clause is a guarantee of "fair warning" to individuals, restricting "governmental power" and "potentially vindictive arbitrary legislation"[63]; otherwise, basic principles of justice[64] and due process (Fuller 1964, 52) are offended. The application of the law in force at the time of the facts is meant to "to achieve the just result in the case in question"[65]. Individuals have the right to choose whether or not to behave in accordance with the laws[66].

When laws are created, people create expectations about the possible return given by the legal system to their actions. Retroactivity disturbs such expectations and actions, being "rarely defensible" and violates the "Rule of Law, that is, people's right to guide their behavior by previously and publicly established impartial rules. This violation undermines human autonomy by hampering people's ability to formulate plans and carry them out with respect for the rights of others" (Munzer 1982).

Although recognizing the difficulty in establishing absolutely untouchable *interpretative beacons*, their non-observance is only admitted in extremely exceptional cases, duly justified in situations of institutional abnormality. Its flexibility is only possible in the face of the defense of the Rule of Law itself.

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[62] The American Supreme Court decided that: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal" (USA, Landgraf v. USI Film Prods. (92-757), 511 US 244 (1994).

[63] USA, Weaver v. Graham (1981) Supreme Court of the United States.

[64] As stated by Hart: "Dworkin makes another charge that judicial law-making is unjust and condemns it as a form of retroactive legislation or *ex post facto* law-making, which is, of course, regarded general, as unjust". Hart rejects such an objection for hard cases, "since these are cases which the law has left incompletely regulated and in which there is no known, clearly established state of law that justifies expectations" (Hart 2007, 339 – free translation).

[65] In the original: "Applying decision-time law on the 'right answer' conception is simply reaching the just result in the case at hand" (Roosevelt 1991).

[66] Mann, Patricia 2007. The American Constitution provides that no state may enact any ex post facto legislative act or law that impairs contractual obligations (US CONST, art. I, § 10).

Otherwise, the greater the weighting of moral and political principles, the less predictability, which leads to a sea of vagueness about these principles, opening to the infiltration of subjective elements.

Even in hard cases, the magistrate cannot "invent rights retroactively"[67]. Even less can obligations be invented retroactively.

Retroactivity is possible in some cases. Annulment actions, as well as decisions on constitutionality control, are intrinsically retroactive, deconstructing past situations. That's not what this is about. The object of the *interpretative beacon* of an objective-temporal character concerns the interpretation carried out in hard cases, whose normatization *in concrete* cannot burden the party or third parties.

In other words, retroactivity that burdens the party in a surprising and unpredictable way cannot be admitted. Otherwise, retroactive interpretation is possible, provided that no obligations are created for the party. Thus, for example, the judgment that the construction of a building in a certain area needs a specific environmental document is a valid one. It can be demanded from new builders and from those who have already built, as long as they are not punished for not having it previously (the obligation was non-existent).

In Hart (2007, 91), the impossibility of retroactivity affects primary norms more intensely than secondary norms. Primary norms concern the norms that govern rights, obligations, faculties, burdens, duties and other conduct of people. Secondary norms, on the other hand, have as object the norms themselves, establishing criteria for validity, effectiveness, application and interpretation of other norms.

With these premises defined, it would be possible to recognize retroactive homosexual marriage[68], since it involves primary rules of interest restricted to the parties, without encumbering third parties.

The solution of hard cases cannot retroact to harm third parties, due to the requirement of legal certainty, which is inevitable in the Rule of Law. However, when burdening no one, such a rule becomes flexible in view of

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[67] In Dworkin's words: "The judge still has the duty, even in hard cases, to find out what the rights of the parties are, and not to invent new rights retroactively" (Dworkin 2007, 128).

[68] Beswick 2020, 280. As another illustrative example, the author of this work, in the position of judge of the Court of Justice of the State of Roraima, upheld the request for rectification of the civil birth registration, authorizing the change of name of the party, including with retroactive effects for possible alteration of documents, such as the documents already produced (Brazil, TJRR, Judicial District of Boa Vista, 5th Civil Court, Process nº 0836886-31.2014.8.23.0010, sentence handed down on 04/25/2017).

the possible weighghing of principles in the case, leaving the courts to look "at the previous history of the rule in question, its purpose and effect"[69].

3.2. *Subjective-spatial beacon* (alterity)

In addition to the *objective-temporal interpretative beacon* (irretroactivity), there is the *subjective-spatial* (alterity).

This second guideline concerns the restriction of a subjective right, forbidding the one under a given jurisdiction to be surprised by normative innovations imposing a legal burden on it. People cannot be affected by interpretations, even less when they create obligations, burdens, responsibilities or any negative impact on the legal personality.

The interpretative limits have in perspective the man (microscopic) as the center of the legal order (axiological anthropology), recognizing his rights and duties, which cannot be arbitrarily imposed.

The relationship between subjects occurs in a given legal space. It is the environment in which objects influence the subject (Kant undated, 48). In this space, legal relationships are also formed and materialized, consisting of rights and duties. This *locus* is society, both the subject and the object of law.

Once reason is established as a Weberian instrument of domination, duties can only be attributed with transparency, predictability and honesty. At stake is the "*requirement of a foundation* for all claims that in intersubjectivity and in coexistence I address to others and that others address to me" (Neves 1998b, 33). Such rationality removes the imposition "of the mere will, power or prepotency of any of these members, but justifiable by their relative positions in this unit or common member. A normative meaning, in a word, that imposes a superior and independent justification of the simply individual positions of each one and that, as such, simultaneously and equally binds the members of the relationship" (Neves 1998, 78).

The postulate of the *ethical subject* "can only admit any position or claim with *validity*: with a foundation that does not detract from and rather satisfies dignity and equality, which before these validly justifies the position or claim" (Neves 1998b, 34). Therefore, otherness, seen as the possibility of reaching the other, depends on a foundation of validity to assign responsi-

[69] Chevron Oil Co. v. Huson, 404 US 97 (1971) and American Trucking Assn's v. Smith, 496 US 167, 179–86 (1990).

bilities, duties and obligations, and the Law cannot serve "as a mere social instrument of rationalization and satisfaction of interests or political-social objectives" (Neves 1998b, 34).

One's right ends where the other's right begins. This is a golden rule used in different contexts. John Stuart Mill holds that the actions of individuals should be limited only to prevent harm to other individuals (Mill 2003, 139). Former US Supreme Court Justice Oliver Wendel Holmes Jr. famously said: "my right to move my fist ends where your chin begins". This rule defines spatial limits to rights, with respect to alterity. What is right for one may not be right for another. Two rights cannot occupy the same space, although they can be reconciled/combined into a common denominator.

The legal personality consists of the spatial circumscription for the exercise of rights and obligations, conferred by the legal system. A clear, predictable, stable legal system is a prerequisite for validating the Rule of Law[70]. And this space is a limitation to the interpretative discretion, mainly in the examination of hard cases.

In exercising discretion, the magistrate cannot create obligations, responsibilities, burdens or any other kind of negative impact on the individual rights. The Rule of Law presupposes obligations only under legal provision, including in the sense of laying down what one can (should) or cannot do. You can reject the postulation of improving your legal situation, but you cannot make it worse.

One cannot lose sight of the fact that a Democratic State presupposes the observance of majority rule, in general. And that majority is manifested through the appropriate institutional channels. When the Judiciary exceeds the interpretative limits, it goes beyond its attributions, usurping the functions of the other powers, breaking the democratic supremacy. It attacks the Rule of Law and attacks what it should defend: legal and institutional normality.

The first two precedents of the Supreme Court Portuguese (2001 and 2013) about *wrongful birth* are in accordance with this limitation, as the claim was dismissed, denying the right to compensation. In other words, the *status quo* has not changed.

[70] "The World Justice Project" defines four universal principles in the construction of a concept of the rule of law, among which the following stand out: "2) clear, stable, public and fair laws that protect fundamental rights and guarantees" (Botero, Ponce 2011, 5).

In the case judged in 2015, the obligation to pay compensation was imposed on the doctor and the clinic, without there being a clear law on the issue. A new rule was created, in an unpredictable way, regulating legal situations that had already occurred, going beyond the limits of interpretative discretion. The coherence of the legal system was violated, creating responsibilities without the party being able to anticipate such a result.

In these judgments, the *judge-mediator* model prevailed. The way to solution the case was based on the dialectic between the system, with the handling of legal materials, and the problem presented (concrete case).

The relationship between individuals in a society is based on trust (Kronman 2009, 192) and in the pursuit of the common good. Aristotelian ethics is based on otherness and the right to a rational, predictable, institutionalized system that prevents the creation of irrational, unpredictable obligations by informal means. If there is a right to an orderly, rational, predictable system based on trust, there is no duty to act contrary to these dictates.

Even if Posner's pragmatic realism is used, the same criterion of protection of the right of the party is valid as an interpretative limit, with the use of the Pareto optimum:

> For POSNER, the challenge is fulfilled by specifying-overcoming the PARETO model (Pareto optimality/Pareto superiority), a model that, as we know, teaches us to recognize that a state P is superior to another state Q, if and only if, when verifying the transformation from P to Q, no individual is worse off than before and it is verified that at least one of them improves their situation (according to their own conception of well-being).
>
> As expected, exploiting the step offered by Nicholas KALDOR and John HICKS (Kaldor–Hicks efficiency) and their principle of potential compensation ("There are always winners and losers, a state of affairs is superior to another if the result of the transformation that connects them translates into a social compensation of the losers by the winners») (Linhares 2012, 23).

A state of affairs is superior to another when no individual is worse off than before and it is found that at least one of them, according to his own conception of well-being, improves his situation, according to the Pareto optimum.

In summary: the *subjective-spatial beacon* establishes a material requirement and another of a formal-procedural character. From a formal-procedural point of view, when judging a hard case, the parties are assured of the principles of contradictory and full defense. The argument of the other must be considered in the judicial decision. In addition, from a substantive point of view, the interpretation given to the merits of the controversy will be limited by the impossibility of creating retroactive obligations.

4. Conclusion

This paper makes a contribution to legal methodology, in the search for interpretative limits to judicial discretion. Among the different answers found by the interpreter/judge, a model of exclusion of incorrect answers is suggested, in view of their legal irrationality.

Rationality presupposes a legal system based on trust, predictability, and intersubjectivity. Emotional excesses and obscure criteria compose a scenario of arbitrariness. There are virtues to be respected in the Rule of Law (*rule of law virtues*).

Legal interpretation must be rational, developing within the interpretive openings and limits set in each legal system, based on the bundling of internal factors (related to the judge/interpreter) and external factors (related to the environment).

In the different legal systems, the preponderance of some or other factors can give rise to three types of judges: *officials, activists* and *mediators*. Each species does not necessarily represent a legal system and can even be found in the same court. Or the same judge embodying one representation or another, depending on the case or his state of mind (Dworkin 2011, 149).

In recent decades, many judges have exacerbated their interpretive role, as *activist judges* reportedly do, even for the easy cases. They have this tendency to grant themselves greater interpretative amplitudes, resulting in irrational decisions. Even official judges are faced with such breadth in hard cases. There is a need to discuss their limits. As a contribution, this work conceives the model of *interpretive beacons*.

The *interpretative beacons* are interpretative limits related to the supra-positive principles of Neves (1982), despite his rejection of abstract models

of interpretative legitimacy[71]. The beacons guide the interpreter's activity, within which several decision-making models can be used in search of the correct answer that is legally rational, even if more than one is admitted. However, outside of those beacons, rationality is violated, fulminating the judicial decision.

There are two *interpretive beacons*. Space and time are prerequisites for a legally rational conclusion. Both concepts are used under the objective and subjective aspects, respectively.

First, the *objective-temporal interpretative beacon* consists in limiting the interpreter's ability to consider the time factor, without the retroactivity of the innovative and unpredictable conclusion. On the other hand, the *subjective-spatial guideline* refers to the *locus* in which legal relations are developed, through legal relations between people.

This study sought to determine whether the *interpretative beacons* seen under the binomial[72] *objective-temporal* and *subjective-spatial* can serve (and, if so, in what dimension) as guarantee limits of legal rationality. We have concluded that this concept can be used in a complementary way to juridicist proposals.

The methods of Dworkin (argument of principles) and Neves (methodological scheme) are affirmative conceptions about how cases should be decided. The jurisprudentialist model was accepted, as it admits the multiplicity of correct answers, unlike the Dworkian "correct answer" model. The proposal of *interpretative beacons* intends to remove certain answers that violate the interpretative limits represented in the *objective-temporal* and *subjective-spatial* aspects. That's why it's a negative conception, demonstrating the borders outside which the decision suffers from irrationality.

The "easy cases / hard cases" binomial was adopted, as the decision-making method for each one of them was considered different. Many easy cases can be solved with the formalist method, with the subsumption of the fact to the norm, without permission for discretion, although *activist judges* exercise it in these situations.

[71] Castanheira Neves rejects abstract models of interpretative legitimation, arguing that the "foundation of legitimacy cannot itself be simply formal: legitimation always summons a presupposed material intention that is, indirectly or ultimately, also a foundation of validity" (Neves, 1982, 212 – free translation). However, it understands that it is possible to establish supra and transpositive interpretative limits.

[72] The word "binomial" is used with the meaning of complementation and not of opposition. The two beacons complement each other.

As for hard cases, even *official judges* will be faced with the interpretive windows through which the interpreter is legitimated to act, with the manipulation of legal materials. In this work, the juridicist proposal is adopted for the solution of hard cases, rejecting authentic discretion, understood as the handling of non-legal criteria to issue decisions in open areas.

The premises of jurisprudentialism are accepted, in the sense that the interpretative limits have in perspective the man (microscopic) as the center of the legal system (axiological anthropology), recognizing his rights and duties, not being able to impute them arbitrarily. And that the solution of the concrete case is based on the practical-legal rationality resulting from the "dialectic between system and problem in a judicial objective of normative realization" (Neves 1998b, 37), different from logical-deductive and instrumental-strategic rationales (Linhares 2010, 450).

The beacons model intends to be a contribution to this system, defining borders outside which the legal conclusion is understood as legally irrational, for violating fundamental pillars of law. It conceives them as interpretative limits through the *exclusion method*.

In the analysis of the three judgments of the Portuguese Supreme Court of Justice about wrongful birth, from the perspective of jurisprudentialism, there was rationality. There were three correct, although different, answers for the same case.

However, in the last of these judgments (2015) it appears that there was a change in case law to recognize the obligation to compensate the person causing the damage (doctor/laboratory), undermining the legal categories based on space and time, associated with the rule of law virtues (predictability and stability). This is because the decision creates a retroactive obligation (to compensate) (at the time of the facts, jurisprudence understood the legality of the act). This last judgment is considered irrational from the perspective of the interpretative guidelines, due to the discretion disregarding the attributes of predictability and legal security allied with respect for alterity, legitimizing the rational-legal power in the Weberian perspective, core elements of the Rule of Law.

The assumption of anthropological centrality is incompatible with the situations fictionally mentioned by Kafka but encountered in reality. The Rule of Law will be shattered if someday the person under jurisdiction hears something like: "I can't tell you, I can't tell you at all, that you are accused, or, to put it better, I don't know if you are. What is certain is that you are under arrest. This is all I know" (Kafka 1982, 17).

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